APPENDIX A

United States Court of Appeals
FOR THE SECOND CIRCUIT

CRANE COMPANY,

Plaintiff-Appellant,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, *et al.*,

Defendants-Appellees.

CRANE COMPANY,

Plaintiff-Appellant,

—v.—

AMERICAN STANDARD, INC., *et al.*,

Defendants-Appellees.

PETITION OF DEFENDANT-APPELLEE AMERICAN STANDARD, INC. FOR REHEARING OR, ALTERNATIVELY, FOR REHEARING IN BANC

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PETITION OF DEFENDANT-APPELLEE AMERICAN STANDARD, INC. FOR REHEARING OR, ALTERNATIVELY, FOR REHEARING IN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, defendant-appellee American Standard, Inc. ("Standard") respectfully petitions this Court for a rehearing, or for a rehearing in banc, of the decision dated December 10, 1969, insofar as that decision finds that Standard violated Section 9(a)(2) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC.

This Court has announced a far-reaching decision having a chilling effect upon the ability of target corporations to fend off would-be corporate raiders. Here a target corporation turned to Standard for defensive help by way of a negotiated merger. Standard, in support of the merger, tried to compete with the aggressor in the market place for shares of the target corporation. But this competition was found by this Court to constitute manipulation. Because the finding does not reflect the realities of market life in this era of corporate warfare, it beclouds the legitimacy of future efforts to maintain corporate independence. And, this issue of important consequence for an increasingly important area of corporate life has been determined by the appellate court in a factual vacuum, for it was not even tried below.

In reaching out to hold that Standard was guilty of unlawful "manipulation", this Court has based essential elements of its conclusion (a) on a presumption regarding the duration of Crane Company's ("Crane") tender offer that is indisputably wrong; (b) on "evidence" as to Crane's "forced sale" that is not in the record and has no other source than anonymous newspaper stories cited by Crane in its brief; (c) on certain stock transactions that occurred after the close of the trial and whose cause and significance depend on undisclosed facts known only to Crane itself; (d) on "facts" regarding Standard's purpose and motive assumed by this Court in contravention of specific findings of fact made by the District Court on the basis of demeanor evidence of witnesses who testified at the trial below; and (e) on assumptions regarding the operation of the stock market that are unsupported by any evidence in the record. Standard, if given the opportunity in an evidentiary hearing, stands ready to expose all of these predicates of the Court's decision as incorrect and to demonstrate on the basis of fact, not conjecture, that it was not guilty of manipulation.

Such misapprehension of the decisive facts is no happenstance, but is a direct consequence of having a different case presented to the appellate court from that which was tried below. Thus this Court in a peculiarly complex situation has taken upon itself the function of being a trier of the facts without the benefit of a trial record in which facts and inferences from facts can be developed in the crucible of presentation, cross-examination and rebuttal.

Context of the Case

This case arises out of an effort by Crane to take over control of Westinghouse Air Brake Company ("Air Brake") first by cash purchases of Air Brake stock and then by an exchange offer for the Air Brake shares which, after three extensions, expired on May 24, 1968. Air Brake opposed the Crane takeover and sought a merger with Standard. To have as many shares as possible to vote in support of the merger, Standard bought some stock of Air Brake. On April 19, to avoid becoming a 10% stock-

holder with consequences under Section 16(b) of the Securities Exchange Act, Standard sold some of its shares to investors who it hoped would favor the merger. At the same time Crane, through its exchange offer, was also buying the stock of Air Brake in order to have as many shares as possible to vote against the merger. By the time of the merger, Crane had accumulated more than three times as much stock as had Standard. Yet the Air Brake stockholders voted to merge with Standard by more than 2 to 1.

The whole basis of the Court's treatment of the "manipulation" point is based upon an erroneous characterization of Standard's transactions on one day, April 19, 1968, nearly a month before the Air Brake stockholders' meeting that approved the merger and five weeks before the end of Crane's exchange offer. This Court assumed that Standard's market activities on that single day were carried out with a deliberate purpose to effect "a dramatic rise in market price" (Slip op. 3898), "to deter Air Brake shareholders from tendering to Crane" (Slip op. 3901), and to "require" Crane to sell out its acquired shares (Slip op. 3900). Not one of these assumptions is based on evidence in the record.

Why Rehearing Should Be Granted

(1) Crucial Finding of Fact Contradicted by All Evidence

As the predicate of its determination of manipulative motive and effect, this Court declared: "The critical day in the takeover battle was April 19, the day Crane's tender offer for Air Brake stock was to expire." (Slip op. 3896)

The facts: Crane's offer did *not* expire on April 19. It expired on May 24—35 days after the supposedly "critical" date, and between April 19 and May 24 shareholders kept tendering to Crane. During these five weeks Crane acquired more than 490,000 shares of Air Brake stock, or approximately a third of its entire holdings as of the date of the merger and three times the amount acquired by Standard on the "critical" day.

Although these facts are undisputed, the Court's opinion rests on the entirely incorrect assumption that Crane's offer

expired on April 19, the day of Standard's alleged "manipulation". In light of the additional 35 days Crane's offer was extended, and in light of the fact that during this time Crane acquired nearly half a million shares of additional stock, it is clear that April 19 was not the "critical" day. This Court's assumption that stockholders were deterred from tendering to Crane as a result of "extraordinary transactions" by Standard on April 19 (Slip op. 3896) is a palpable error.

Since the "manipulation" issue was not tried below, the trial court had no opportunity to make any findings as to the effect, if any, these one-day transactions of Standard had on the eight-week tender offer of Crane. Certainly this Court cannot properly supply the missing evidence through a series of assumptions that ignore the fact that the "defeated" tender offer survived its supposed demise for five weeks and succeeded during that period in garnering nearly half a million shares.

(2) Crucial Findings of Fact Based Entirely on Transactions After Trial and on a Newspaper Story Not in Evidence

The Court's foundation for the determination of Crane's standing: "The success of Standard's maneuver made Crane a forced seller . . . under threat of a divestiture action to be brought by Standard under the antitrust laws." (Slip op. 3908)

The facts: Crane had not sold a single share of stock at the time the trial ended. The issue of sale did not even exist at trial. There was not one word on the subject. There is no basis in the record for this Court's conclusion that Crane was a seller at all, much less a "forced seller", within the meaning of Sections 9(a) and 10(b).

The threatened "divestiture action" is not in the record, but is based on a statement made by Crane in its briefs to this Court, citing only stories in The New York Times and The Wall Street Journal (Crane Br. 6n; Crane Reply Br. 43n)—hardly a proper foundation for a key finding of fact. Nor is there any support for this Court's unexplained statement that "antitrust considerations" would compel such a sale (Slip op. 3900). Many difficult questions of both fact

and law would have to be answered before any such antitrust conclusion could be made, and these questions are not answerable on this record.

The facts surrounding Crane's sales are of course in Crane's sole possession. Since these sales occurred after trial, Standard has had no opportunity to explore the facts—if any—supporting the allegation that Crane was "forced" to sell. It is a serious deprivation of Standard's rights—it is indeed a deprivation of constitutional dimensions—for this Court to hold Standard liable to Crane on the unsupported assumption that Standard "forced" Crane to sell. At the very least, Crane should be required to *prove*, at an evidentiary hearing in the District Court, that its sales were *in fact* the result of Standard's alleged threat. Merely because Crane sold a major part of its holdings during the pendency of the appeal does not make Crane a "forced seller" or otherwise imply a causal link between the alleged manipulation in April and the sales which were made in June and October. It is at least as likely that Crane sold out for such mundane motives as the wish to realize a quick profit or to generate needed cash for use in some new venture.*

Creation of a constructive sale out of this non-evidence, consisting solely of transactions after trial and material appearing only in newspapers, is a substantial and unsupported leap beyond the interpretation of "sale" given in *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1968) and contrary to the reluctance shown by this Court to broaden the concept of

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* SEC Chairman Cohen testified before the Congressional Legislative Committee considering tender offers: "We have the feeling that many of these [offerors] are doing it for the short-term gain, or, to use the vernacular, to make a fast buck. We have a number of variants of that. We have a situation where almost overnight [a] particular individual or company made several millions of dollars in a situation of this kind. We have the feeling that some of these offers are made only to initiate that activity." Extensive reference was then made to Crane's offer for Air Brake by which Crane "made a profit of some $5 million to $10 million. . . ." *Hearing before the Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., on H. R. 14475, S. 510, July 1, 1968, pp. 22-30.

buyer and seller in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, —— F.2d —— (decided Nov. 3, 1969 per Lumbard, C.J., Anderson and Wyatt, JJ.).

The point is essential, for this Court specifically recognized that a violation of Section 9(a) can only be found when the defendant has acted "for the purpose of inducing the purchase or sale" of a security (Slip op. 3899), and only last month this Court squarely held that Rule 10b-5 does not give a right to relief in a tender offer situation where the plaintiff is neither a buyer nor a seller. *Iroquois Industries, Inc.* v. *Syracuse China Corp., supra* (a case in which the shareholders were in fact deterred from tendering to the plaintiff because of the defendant's illegal opposition tactics).

In short, unless there is an *established causal relationship* between the sale and the actions complained of, Crane has no right to relief in this case. Undeniably, there is and can be no such causal relationship shown by the record before this Court.

(3) Evidence of Actual Manipulation Totally Lacking

This Court did not have before it the indispensable facts from which it could make a finding of manipulation. The Court has assumed that there was in fact manipulation, intent to manipulate and the effect of manipulation solely from some sheets of stock market trading prices. Simple reports like this show nothing of the complex of effects and relationships resulting from the simultaneous pendency of an exchange offer and a merger each involving the securities of a third corporation. Rational analysis of such a situation requires a probing into such fundamental phenomena as the interplay of three sets of ever changing market prices, the varying reactions of ordinary stockholders and market professionals and changes in tactical position before and after a record date for stockholder voting.

For example, an expert understanding, impossible on this barren record, is needed of the subtleties of the double market that develops just prior to the record date for a merger. The Court ignored both the existence and the significance of two separate public markets for Air Brake

stock on April 19—a "regular way market" (in which stock was sold without a vote) and a special, temporary "cash market" (in which stock was sold on an accelerated-delivery basis so that the purchaser would acquire a vote through delivery prior to the April 23 record date for voting on the merger). As is perfectly normal in such situations (Crane concedes this), cash trades run several points higher than regular way trades, the purchaser in effect paying a premium price for the right to obtain a vote. Although the ticker tape reports both regular-way and cash trades, identifying cash trades with a special symbol, newspapers report only the regular-way market.

There is not the slightest basis for the Court's assumption that particular transactions in the special cash market on April 19 could have had any effect on the separate regular-way market or have deterred Air Brake stockholders from tendering to Crane. Since only a party to a proxy contest has any conceivable interest in paying a substantial premium by purchasing in the cash market merely to acquire a vote, and since the tape identifies cash-market transactions by the symbol "c", the tape-watching public could not have been deceived by reports that cash sales momentarily reached 50 on April 19. Anyone watching the tape would have readily assumed that Standard (or perhaps Crane or Air Brake) was purchasing stock with proxies attached, and for the obvious purpose of voting those proxies at the forthcoming Air Brake stockholders' meeting. A non-participant in the proxy contest would have had no reason to purchase in the cash market at a 2 to 4 point premium.

Significantly, though several acknowledged experts on securities transactions testified below on issues other than "manipulation", Crane made no effort to prove that anyone at all—least of all Crane itself—was deceived even for an instant as to what was happening. This is a void in the evidence that this Court has filled through sheer hypothesis.

Thus there is no support for the Court's statement that "the effect of these purchases was to create the appearance of an extraordinary demand for Air Brake stock and a dramatic rise in market price . . ." (Slip op. 3897-98). The

special cash market's rise to 50 on April 19 was *not* a rise in the regular-way market, which never rose above 47⅞ on that day, but was solely a peak reached by the cash market in which only Standard (and perhaps others of the principals —who knows, since there was no evidence?) took part as a buyer. In short, the rise to 50 in the cash market in no way implied any "extraordinary demand" for Air Brake stock sold in the normal market (without proxy) but only demand for stock instantly available with vote, a known demand generated by the participants in the well-publicized proxy battle. That demand, far from being artificial, was wholly genuine, and far from being secret, was common knowledge.

Furthermore, the assumption that Standard's one-day transactions in the cash market artificially inflated the price and thereby deterred tenders to Crane is inconsistent with the actual pattern of trading in Air Brake stock during the period of Crane's exchange offer, as disclosed by published reports of trading on the New York Stock Exchange for the months of April and May, which we annex as an appendix to this petition.

In fact, the regular-way market showed no unusual rise on April 19. On April 10, April 11, April 15 and April 16—four of the six trading days just *prior* to the date of the alleged manipulation—Air Brake stock was traded at levels substantially *higher* than 47⅞, the published high for April 19 when the alleged manipulation occurred. Moreover, although Standard completely withdrew from the market after April 23—more than a month before the final expiration of Crane's tender offer—the market price remained within a fraction of the April 19 price through the following week, then rose during the week of April 29 to a high of 48⅜, a half point above the April 19 high. The stock remained at approximately this level during the two succeeding weeks, when it was traded above 48 on six out of the ten trading days.

Even as to the effects of the transactions on April 19 itself the Court's inferences appear all the more vulnerable in light of the fact that 316,662 shares were tendered to Crane on that date, nearly twice the number acquired by Standard.

These facts must be sorted out by a proper trier of facts. They cannot be dealt with in the first instance by the appellate court unaided by a relevant record.

(4) Crucial Finding of Fact Violates Federal Rules

This Court properly recognizes that "both manipulative motive and wilfulness" are elements of the offense of market manipulation (Slip op. 3899), and the Court further recognizes that the District Court—which observed the testimony under extensive cross-examination of all of the key individuals who executed the transactions in question—found that Standard was buying Air Brake shares for the purpose of voting in favor of the merger (Slip op. 3895). The Court nevertheless summarily disregards the District Court's findings of fact on the stated ground that Standard's evidence is "unconvincing", and instead substitutes its own conclusion as to purpose and intent (Slip op. 3901).

As the District Court found after listening to the witnesses testify, Standard's willingness to pay up to $50 a share for stock with proxy was motivated by the fact that its success or failure in the ongoing proxy fight might well hinge on the number of voting shares it could acquire in the open market, especially as Crane was known to have acquired substantially larger blocks of voting shares. And contrary to this Court's assumption that it was in Standard's interest to have Air Brake stock rise in price, Standard in fact had every reason to fear such a rise, for not only would every increase add to Standard's acquisition cost but, more important, such a rise would make the contested merger with Standard look less attractive to the Air Brake stockholders and thereby increase the likelihood that the merger would be voted down at the forthcoming stockholders' meeting.

In assuming illicit motives in contravention of the District Court's finding as to what Standard was in fact seeking to accomplish, this Court has ignored the requirements of Rule 52(a) of the Federal Rules of Civil Procedure. This Court does not even claim that the District Court was "clearly erroneous" on the question of "manipulative motive and wilfulness".

Even if the District Court's findings were deemed incomplete or premised on an incorrect view of applicable legal standards, the appropriate disposition would be to remand the case for new findings by the District Court, and not to make a factual determination on appeal unaided by a pertinent record.

But the root of the problem is that the trial court never had a chance to make findings on the crucial elements of what has turned out to be the "manipulation" case, since no such case was presented by Crane at the trial below. Where essential findings have not been made, this Court has recognized that the proper procedure is to remand for new or additional findings. *In re 716 Third Ave. Holding Corp.*, 340 F.2d 42, 45-48 (2d Cir. 1964).

CONCLUSION

This petition for rehearing, or rehearing in banc, should be granted and on rehearing the judgment should be affirmed or the case remanded for an evidentiary hearing on the issue which has never been tried.

Respectfully submitted,

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December 24, 1969

APPENDIX

WESTINGHOUSE AIR BRAKE COMPANY
MARKET PRICE FOR STOCK AS QUOTED IN
THE NEW YORK TIMES

Date 1968 *April*		*New York Stock Exchange Price*	
		High	*Low*
1		43	42
2		44	42¼
3		44	42¾
4		44¼	43⅜
5		44⅛	43½
6	Saturday		
7	Sunday		
8		47⅜	46¾
9	Exchange Closed		
10		49⅜	48¼
11		49½	48¾
12	Holiday		
13	Saturday		
14	Sunday		
15		49½	48⅝
16		48½	47½
17		47¼	45¼
18		46⅞	45
19		47⅞	44¾
20	Saturday		
21	Sunday		
22		47⅝	45⅞
23		47⅛	46½
24		47	46½
25		47⅛	46½
26		47	46½
27	Saturday		
28	Sunday		
29		46⅝	46½
30		47	46¼

WESTINGHOUSE AIR BRAKE COMPANY
MARKET PRICE FOR STOCK AS QUOTED IN
THE NEW YORK TIMES

Date 1968 *May*		*New York Stock Exchange Price* *High*	*Low*
1		47⅝	47
2		47¾	47⅜
3		48⅜	47⅛
4	Saturday		
5	Sunday		
6		47¾	47¼
7		48¼	47½
8		48¼	47⅞
9		48⅛	47⅞
10		48¼	47⅞
11	Saturday		
12	Sunday		
13		48¼	47⅞
14		47⅝	46¼
15		47¾	47⅜
16		48⅛	47¼
17		47¼	47
18	Saturday		
19	Sunday		
20		46⅞	46⅜
21		46⅜	46⅛
22		45¾	45⅛
23		46⅜	45½
24		46⅛	45⅞
25	Saturday		
26	Sunday		
27		46¼	45¾
28		45¾	45¼
29		46	45½
30	Holiday		
31		47½	45⅜

APPENDIX B

32569-72

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CRANE CO.,

Plaintiff-Appellant,

v.

WESTINGHOUSE AIR BRAKE COMPANY, *et al.*,

Defendants-Appellees,

(and another case).

CRANE CO.,

Plaintiff-Appellant,

v.

AMERICAN STANDARD, INC., and BLYTH & CO., INC.,

Defendants-Appellees,

(and another case).

A petition for a rehearing having been filed herein by counsel for the appellee American Standard, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

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J. Edward Lumbard

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J. Joseph Smith

.....

Irving R. Kaufman

Circuit Judges

March 4, 1970

Appendix

32569-72

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CRANE CO.,

Plaintiff-Appellant,

v.

WESTINGHOUSE AIR BRAKE COMPANY, *et al.*,

Defendants-Appellees,

(and another case).

CRANE CO.,

Plaintiff-Appellant,

v.

AMERICAN STANDARD, INC. and BLYTH & CO.,

Defendants-Appellees,

(and another case).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee American Standard, Inc., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

.....

J. Edward Lumbard
Chief Judge

March 4, 1970